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OKLAHOMA'S SEPARATE COACH LAW.

In McCabe et al. v. Atchison, T. & S. F. R. R. Co., 35 Sup. Ct. 69, LXVII Chicago Legal News 145, the bill brought by several negroes against different railroads for unlawful discrimination by the latter in supplying only for whites, sleeping cars, dining cars and chair cars, was dismissed by the court, because it failed to state a case for the interposition of a court of equity.

What, however, was said by Mr. Justice Hughes, in *obiter* way, in the opinion, the other justices merely concurring in the result, is very interesting indeed, upon the question of the constitutional rights of the blacks being interfered with.

In answer to the contention by defendants that the cars as to which there was alleged discrimination that they were, "comparatively speaking, luxuries, and that it was competent for the legislature to take into consideration the limited demand for such accommodations by the one race, as compared with the demand on the part of the other," and that "the plaintiffs must show that their own travel (supposably travel by their race) is in such quantity and of such kind as to actually afford the roads the same profits, not per man, but per car, as does the white traffic, or sufficient profit to justify the furnishing of the facility, and that in such case they are not supplied with separate cars containing the same. This they have not attempted. What vexes the plaintiffs is the limited market value they offer for such accommodations. Defendants are not by law compelled to furnish chair cars, diners nor sleepers, except when the market offered reasonably demands the facility."

The learned Justice, speaking for himself, for, as said above, there was merely concurrence by the other justices in the result, which was dismissal of plaintiffs' bill, said:

"This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded."

This reasoning, if there is eliminated therefrom, what appears to us mere *ipse dixit* by the learned judge, seems to bring us to no definite point.

The opinion admits that these luxuries may be denied both whites and blacks, if the conditions of traffic do not justify their being supplied. In such case the particular individuals are ignored and they suffer because they belong to an aggregation not large enough, or traveling enough, to give to the carrier a profit for furnishing them.

It is also conceded the races may be classified so as to carry them in separate coaches. Why, if jointly the two classes may be lumped to ascertain whether the facilities may be demanded, may they not be regarded separately to ascertain by which or both the facilities may be demanded? No more in one case than in the other is the personal right regarded, but solely one's relative status to the population of which he is a part.

It may be true that each one has a personal right so far as discrimination is concerned, but that personal right has relation to the surroundings so far as its being de-

mandable is concerned. It would be an absolute right, if the law did not provide for a reasonable classification wherein his claim to the right would fall.

We will suppose that provision is made for facilities of this kind to through passengers and not for local passengers, because the traffic would not pay a profit in doing so. Would a local passenger, who is put within a reasonable classification, have the right to claim discrimination? There is nothing against him as an individual, but only against him according to the circumstance of expense in supplying the facility. It is nothing to him that the carrier may furnish the through passenger what it is able to afford to furnish, but refuses to furnish him the same thing because at a loss. Neither he nor the carrier creates the condition. It inheres in the situation.

So when the negro is denied what the carrier may not supply him as one of a class except at a loss, where is there any personal right violated, constitutional though it be? One class, if reasonably defined, has no right to play, so to speak, the part of a dog in the manger, and say if my class cannot be accorded certain rights, neither shall another be accorded the rights, which it is equitable and right for a common carrier to furnish.

When the learned justice speaks of the negro being denied "a facility or convenience in the course of his journey, which under substantially the same circumstances is furnished to another traveler," this pronouncement gets us nowhere. If he is a member of a class to which the facilities cannot be furnished without loss, and another is a member of another class to which they may be furnished at a profit, the facilities are not denied under substantially similar circumstances as where they are granted.

As we said this part of the opinion seems not concurred in, because Justice Hughes' views on this question had nothing whatever to do with the result arrived at, in which the other justices do concur. Indeed, his views, if given any effect at all, are wholly opposed to the result which was reached.

NOTES OF IMPORTANT DECISIONS

PRINCIPAL AND AGENT—CONTRACTS BY LABOR UNION FOR THE BENEFIT OF ITS MEMBERS—Gulla v. Barton, 149 N. Y. Supp. 952, decided by Appellate Division of New York Supreme Court, appears to involve a variety of presumptions scarcely touched upon by the court in its opinion.

The facts show that plaintiff was working for defendant at a wage of $9.00 per week. While thus employed the labor union, of which he was a member, made a contract that all of the members should be employed at union wages at the rate of $18 per week. The object of defendant in agreeing to pay these wages was to prevent strikes and secure the use of the union label. These labels were furnished by the union and used by the defendant doing business as a union brewery. Plaintiff, apparently ignorant of the arrangement by the union, continued to work at $9 per week, and on ascertaining its existence, sued for the difference. There was judgment in defendant's favor, which was reversed by appellate division.

The court in division rules the case on the simple proposition that the contract was made for plaintiff's benefit and furthermore that the union in making it and supplying the consideration therefor, as plaintiff's agent, considered him embraced therein.

We think this case was rightly ruled above, independently of any presumption of knowledge or even of actual knowledge, by the plaintiff of the union's arrangement. We say this because the court intimates that had there been such knowledge there would arise a waiver. We think there would have to be consideration for such waiver. Plaintiff had a vested right in the contract made by the common agent of the members and this contract, though executory in nature, matured the right to demand all it called for, because in addition to the services rendered his agent continued to furnish and defendant continued to receive the consideration provided thereby. We do not, however, as does the New York court, regard this contract as one made for the benefit of a third person. If we did, we would rather think plaintiff acquired nothing thereby except a gratuity, which would be irrecoverable. But the principle of agency and the delivery and acceptance of benefits is amply sufficient for the judgment in plaintiff's favor.

SELF-DEFENSE—DUTY OF RETREAT BY ONE ASSAULTED IN HIS DWELLING.—Sir Edward Coke said: "A man's house is his castle et domus sua cuique tutissimum refugium,"

and Burke elaborated this idea in a burst of eloquence that is famous in literature. Third Institute of Coke, p. 162; Burke's Speech on Excise Bill. See also Lemayne's case, 5 Rep. 91. But does the principle apply when the owner of the house is assailed by one lawfully therein, so far as the duty of retreat is concerned? New York Court of Appeals holds that it does, two of the judges dissenting. People v. Tomlins, LII N. Y. Law Journal, 1249, decision rendered Dec. 18, 1914.

The principle of no duty to retreat when an owner is assailed has grown out of the perfervid aloquence of an elder English day and often has it been declared in cases where the owner is assailed from the outside, such owner defending himself on his own doorstep or from within. The New York court says: "The rule is the same whether the attack proceeds from some other occupant or from an intruder. It was so adjudged in Jones v. State, 76 Ala. 8, 14. 'Why,' it was there inquired, 'should one assailed by a partner or cotenant, any more than when assailed by a stranger who is unlawfully on the premises, flee? Whither shall he flee, and how far, and when may he be permitted to return?'"

This case assumes that because one may not be driven from his home by an assailant lawfully therein, so he has no duty to retreat to any position in his own home that may be open to him so as to avoid the necessity of killing his assailant. If assailant and assailed are in the home on equal terms and a sudden affray springs up, there is no case of a man being attacked in his own home in the sense of the principle at issue. Perhaps one cannot be made to retreat beyond the limits of his home, but why he may kill one there with equal right to be there as he, when he can avoid doing so is not clear. The principle is for the protection of the home against intruders and not for the protection of the owner of the home, when there is no intrusion. The owner's protection is derivative and not absolute.

CONSTITUTIONAL LAW—CHANGE OF DECISION BY STATE COURT AS IMPAIRING OBLIGATION OF CONTRACT.—The Supreme Court, after announcing other settled propositions, goes on to say: "It is equally well-settled that an impairment of the obligation of the contract within the meaning of the Federal Constitution, must be by subsequent legislation, and no mere change in judicial decision will amount to such deprivation." Ross v. Oregon, 227 U. S. 150; Moore-Mansfield Constr. Co., v. Electric Installation Co., 234 U. S. 941." Cleveland & C. R. Co. v. City of Cleveland, 35 Sup. Ct. 21.

The court goes on to say that: "An examination of the record shows that the Federal right set up in court of common pleas and considered in the circuit court, the latter judgment being affirmed by the supreme court without opinion, concerned an alleged change of decision in the supreme court of Ohio, construing a statute concerning the contract upon which the railroad companies relied, the effect of which, it was alleged, would be to do violence to the contract clause of the Federal Constitution. It was not set up that subsequent legislation had impaired the obligation of the contract of the railroad companies. Therefore in the light of the decisions of this court above quoted, no federal right was alleged to have been impaired within the meaning of the constitution of the United States, and no such right was passed upon in the decisions of the courts."

Looking back to the cases referred to, we discover that the latter of them says:

"Courts of the United States are courts of independent jurisdiction, and when a question arises in a United States court as to the effect of a change in decision which detrimentally affects contract rights and obligations entered into before such change, such rights and obligations should be determined by the law as judicially determined at the time the rights accrued. In every such case the Federal courts, while leaning to the view of the state court as to the validity or interpretation of a law of the state, will exercise an independent judgment, and will not necessarily follow state judicial decisions rendered subsequently. Burgess v. Seligman, 107 U. S. 20, 33, 27 L. Ed. 359, 365, 2 Sup. Ct. Rep. 10; Loeb v. Columbia Twp., 179 U. S. 479, 493, 45 L. Ed. 285, 291, 21 Sup. Ct. Rep. 174."

Here is a reminder of all that court has said about "oscillation in decision" and change of decision being in effect an amendment of the old statute, and now we learn, that we have an independent court which will merely lean to the view of state courts in construction of their own statutes, where they oscillate. It makes one think that almost any reason is good enough for that court to refuse to follow the rule that a state court may construe the statutes of its state as to them appears right. In other words, this independent jurisdiction will sometimes apply that as state law which has been decided not to be state law, and at other times they will declare that by later decision a contract has not been impaired by change of decision. They will, however, take no note of any impairment unless in a case before it in ordinary appeal thereto.

AN ANALYSIS OF THE LABOR SECTIONS OF THE CLAYTON ANTI-TRUST BILL.*

Congress has passed the Clayton Anti-Trust Bill, so-called, the President has signed it, and it has become a law. *In the shape in which it finally passed it makes few changes in existing laws relating to labor unions, injunctions and contempts of court, and those are of slight practical importance.*

First, it does not change in any respect the Sherman Anti-Trust Act, as it has been construed by the supreme court relative to those matters. Both the Senate and House Judiciary Committees, which reported the bill, so stated, and its provisions bear them out. The Senate Committee in its report said, "It is well, at the outset, to state the theory of the bill, both as it passed the House of Representatives and as it is proposed to be amended, for the general scope of the House measure is unchanged. It is not proposed by the bill or amendments to alter, amend or change in any respect the original Sherman Anti-Trust Act of July 2, 1890. The purpose is only to supplement that act and the other anti-trust acts referred to in section 1 of the bill." The Senate Committee also quoted from the report of the House Committee to the same effect as follows: "The bill does not interfere with the Sherman Anti-Trust Act at all; it leaves the law of conspiracy untouched, and it is not open to effective criticism on any constitutional ground."

Moreover, the bill in section 4 re-enacts, word for word, section 7 of the Sherman Anti-Trust Act, under which the Loewe case was brought to and decided by the Supreme Court, without excepting that or any other case from its provisions, which action, upon established principles of construction, is an adoption by Congress of the doctrines of that case. In addition, section 6 gives every person, without exception, the right to injunctive relief against threatened loss from conduct of anyone in violation of that act, without excepting any case whatever. Read in the light of the foregoing, section 6 of the bill is nothing more than a legislative declaration of the law as it had been laid down by the Supreme Court in the case of Adair v. U. S. 208 U. S. 178, which was under consideration by the court along with the Loewe case and was decided just one week before it, to the effect that Congress, under its power to regulate commerce, *had not* prohibited and *could not prohibit* the existence of labor organizations as such. The court there said:

"Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employe's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have *in itself* and in the eye of the law any bearing upon the commerce with which the employe is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of their members as wage earners—*an object entirely legitimate* and to be commended rather than condemned. But surely those associations as labor organizations have nothing to do with interstate commerce as such. One who engages in the services of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. His fitness for the position in which he labors and his diligence in the discharge of his duties cannot in law or sound reason depend in any degree upon his being or not being a member of a labor organization. It cannot be assumed that his fitness is assured, or his diligence increased, by such membership, or that he is less fit or less diligent because of his not being a member of such an organization. It is the employe as a man and not as a member of a labor

[*This article is by Mr. Daniel Davenport, Counsel for the American Anti-Boycott Association, who has given many years of study to the subject of labor injunctions and boycotts.—Ed.]

organization who labors in the service of an interstate carrier."

The right of labor unions *as such* to exist, and the limitations on their lawful activities, are well defined in the case of Gompers v. Bucks Stove and Range Co., 221 U. S. 439, and section 6 of the Clayton Bill is but a declaration by Congress to the same effect, and is almost a paraphrase of it. The court in that case said:

"Society itself is an organization and does not object to organizations for social, religious, business and all legal purposes. The law therefore recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence and power that comes from such association. By virtue of this right, powerful labor unions have been organized. But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the constitution, or by standing on such rights and appealing to the *preventive powers of a court of equity*. When such appeal is made, it is the *duty of government* to protect the one against the many as well as the many against the one.

In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words 'unfair,' 'we don't patronize,' or similar expressions, a force not inhering in themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts' and as much subject to injunction as the use of *any other force* whereby property is unlawfully damaged. When the facts in such a case warrant it, a court having jurisdiction of the parties and subject matter has power to grant an injunction."

I insert here for comparison with the foregoing declarations of the law by the Supreme Court the words of section 6 of the Clayton Bill, that it may be seen that they work no change in the existing law.

"The labor of a human being is not a commodity or an article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

In this connection it is proper to refer to the legislative history of this section for its better understanding. For twenty-four years the labor unions had sought specific exemption from the provisions of the Sherman Anti-Trust Act by an amendment of it, stating that it should "not apply to" them, but had never succeeded. When the Clayton Bill was before the House several attempts were made to amend this section by inserting in lieu of the words "shall be construed to forbid the existence, etc., of labor unions, etc.," the words "shall apply to," but they were all defeated. This was but a repetition of what was thus described by the supreme court in the Loewe case. "The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, but that all these efforts failed, so that the act remained as we have it before us."

This section further declares that nothing in the anti-trust laws shall be construed to forbid or restrain the individual members of labor unions from *lawfully* carrying out the *legitimate objects* thereof. The legitimate objects of the labor union, of course, are the same as those of other people, the advancement of their own interest by lawful means. This section, therefore, does not affect in the least the restraints of the Sherman Anti-Trust Act upon the members of such unions from

carrying out *unlawfully* either the legitimate or illegitimate objects thereof.

When does a labor union become an unlawful combination under the Sherman Act, and what are the means which it and its members are prohibited thereby from using? The answer is to be found in Eastern States R. L. D. Asso. v. United States, 234 U. S. 600:

"It broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce. * * * In Loewe v. Lawler, 208 U. S. 274, this court held that a combination to boycott the hats of a manufacturer and deter dealers from buying them in order to coerce the manufacturer to a particular course of action with reference to labor organizations, the effect of the combination being to compel third parties and strangers not to engage in a course of trade except upon conditions which the combination imposed, was within the Sherman Act. In Gompers v. Bucks Stove & Range Co., 218 U. S. 418, after citing Loewe v. Lawler, this court said (p. 438): *'but the principle announced by the court was general.* It (the Sherman Act) covered *any* illegal means by which interstate commerce is restrained, whether by unlawful combination of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, black-lists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter.'

"'These principles are applicable to this situation. Here are wholesale dealers in large number engaged in interstate trade upon whom it is proposed to impose as a condition of carrying on that trade that they shall not sell in such manner that a local dealer may regard such sale as an infringement of his exclusive right to trade, upon pain of being reported as an unfair dealer to a large number of other retail dealers associated with the offended dealer, the purpose being to keep the wholesaler from dealing not only with the particular dealer who reports him, but with all others of the class who may be informed of his delinquencies. 'Section 1 of the act is not confined to voluntary restraint, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraint, as *where persons not so engaged* conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein.' U. S. v. Patten, 226 U. S. 541." * * * "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in Granada Lumber Co. v. Mississippi, 217 U. S. 433, 'when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished if the result is hurtful to the public or to the individual against whom the concerted action is directed.'

"When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress."

It is to be observed that the foregoing case demonstrates that the distinction between the primary and secondary boycotts has no place under the Sherman Act, for it was a case of what would be termed a primary boycott by those who claim to see something in that distinction at common law.

This section does not affect in any respect the liability of the members of such unions for the unlawful acts of their officers and agents, when within the scope of their authority, as the same has been estab-

lished in the Loewe case. Nor does it change in any way the rules of evidence by which the unlawful nature of such combinations is established. The same remain as laid down as follows by the supreme court in the Retail Lumber Dealers' case above cited.

"But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done; and when, in this case, by concerted action the names of wholesalers who are reported as having made sales to consumers *were periodically reported* to the other members of the association the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred."

Nor does this section sanction the existence of, or remove from the condemnation of the civil and criminal provisions of the Sherman Act, or justify or excuse a conscientious Department of Justice in neglecting to proceed against such a combination as the American Federation of Labor, whose constitution provides for the declaration of boycotts, and establishes a vast machine for their prosecution in interstate commerce, and directs its Executive Council to secure the unification of all labor organizations so far as to assist each other in making the same effective, and whose principles and methods are thus accurately described in the following report unanimously adopted by its Convention of 1905.

"We must recognize the fact that a boycott means war, and to successfully carry on a war, we must adopt the tactics that history has shown are most successful in war. The greatest master of war has said that war was the trade of a barbarian, and the secret of success was to concentrate all your forces upon one point of the enemy, the weakest if possible. In view of these facts, the committee recommends that the State Federations and Central bodies lay aside minor grievances and concentrate their efforts and energies upon the least number of unfair parties or places in their jurisdiction. One would be preferable. If every available means at the command of the State Federations and Central bodies were concentrated upon one such, and kept up until successful, the next on the list would be more readily brought to terms and within a reasonable time none opposed to 'fair' wages, conditions or hours, but would be brought to see the error of their ways and submit to the inevitable."

The Sherman Anti-Trust Act, having been enacted under the constitutional power of Congress to regulate commerce among the states, is, of course, the supreme law of the land, in all cases within its purview, in every state, territory and district, and judges of every court, federal and state, are bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding. *Since there is nothing in the Clayton Bill which limits in any way the restraints of that act upon the unlawful acts of labor unions, or their members, and since it goes still further and specifically grants to any person threatened with irreparable injury from acts forbidden by that Act injunctive relief, the protection of the individual, whether employer or employe, instead of being impaired, is greatly increased by it.*

Second. Let us turn next to sections 17, 18, 19 and 20 of the bill, which deal with the subject of the issuance of restraining orders and injunctions by federal courts.

There is nothing in the first three of those sections which would justify any extended comment here. They make no material changes in existing law and practice. Such small changes as are made are in provisions which are merely directory, not mandatory, and which the courts will construe as having been intended by Congress to promote the administration of justice, not to impede it, and to secure the rights of all parties.

There is, however, one thing about these sections which is most noticeable, and that is the total repudiation therein by Congress of the contention made before its

committees, for the last twenty years, in behalf of the labor unions, that the federal courts have no power to enjoin the commission of acts which are crimes, and their equally persistent contention, that the issuance of injunctions by the federal courts to protect any right except property or a property right, defined by them so as to exclude from its meaning the *right to do business,* the *right to work,* to *buy and sell labor,* or to *seek and obtain employment,* is a usurpation by those courts which they called upon Congress to forbid. The whole scheme of the Trades Commission Bill, and of most of the Clayton Bill, is framed in complete negation of the doctrine that Courts of Equity cannot issue injunctions except to protect property or property rights so defined, or that they cannot enjoin the commission of acts which are also crimes. *Indeed, what has been so long denounced as "Government by Injunction" has been enormously extended by these two bills. And sections 21 and 22 of the Clayton bill (to be hereafter discussed) specially provide for the enforcement of injunctions issued to forbid acts which are crimes, by penalties of unexampled severity.*

Labor's Bill of Rights—But section 20 of the Clayton Bill calls for special remark, for it is said to be that section which constitutes "Labor's Bill of Rights." It singles out for special treatment from the vast field of cases over which, by the Constitution and laws of the United States, the federal courts have jurisdiction, those only which are between *employers* and *employes* or between *employes,* or between persons *employed* and *persons seeking employment* where *such relations actually exist* at the time suit is brought and an injunction is applied for, which suits involve or grow out of disputes concerning terms and conditions of employment.

Suits between parties, who previously sustained those relations, but have ended them, and suits between either of said parties and outsiders, are not covered by this section. Suits between an employer and his ex-employes who have struck, and boycott cases generally, are excluded from this section. Apparently, also, the class of cases to which the section relates is still further limited by being confined to suits between the specified parties brought to prevent irreparable injury to *tangible property or property rights,* because the application for an injunction in the specified cases must describe *"with particularity"* the property or property right to be protected by the injunction. But whether this last limitation on the class is intended or not, it is clear that suits to protect other rights between such specified parties, and suits between either of such parties and outsiders to protect property, or other rights, and suits between parties who have previously sustained the relations specified but have terminated them, are not included in the prohibition against the issuance of injunctions addressed to the federal courts in this section. The legislative history of this section shows that these exemptions were intentionally made.

And in the very limited class of cases to which the prohibitions of the section are confined by its terms, what are the acts which the federal courts are prohibited by this section from enjoining? They are *any* acts or acts which might *lawfully* be done *in the absence of such dispute, including* the *lawful* termination of the relation of employment, the *lawful* recommending, advising or persuading others by peaceful means to terminate employment, the *lawful* attending at any place where it is lawful to be, for the purpose of peacefully obtaining or communicating information, the *lawful* peaceful persuasion of any person to work or to abstain from working, the *lawful* ceasing to patronize or employ any party to such dispute and the *lawful* recommending, advising or persuading others by peaceful and lawful means so to do, the *lawful* paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value, and the *lawful* assembling in a peaceable and lawful manner. It

is these acts which the federal courts are forbidden to enjoin in the limited classes of cases specified in this section, and which "shall not be considered or held to be violations of any *law of the United States.*"

Since the injunctive power of the federal courts of equity has always been limited to the prevention of irreparable injury from *unlawful* acts, it will be at once seen that this section does not change in the least the existing law, that it is merely a legislative construction of the law as already declared by the courts, and that "labor's rights" like those of everybody else, are secured to it, not by this section, but by the federal and state constitutions and laws of long standing, passed in pursuance of both. The section merely provides, that in the specific suits between the parties named acts which would be lawful when no "dispute concerning terms and conditions of employment" existed between them, shall not be enjoined or considered or held to be violations of any law of the United States.

That this is what the section means is shown by the history of the times, to which the courts will look in construing it. It was passed by a Democratic Congress in literal performance of the following platform pledge of the Democratic Party in 1908 and repeated verbatim in 1912:

"Questions of judicial practice have arisen, especially in connection with industrial disputes. We believe that the parties to *all* judicial proceedings should be treatwith *rigid impartiality,* and that injunctions should not issue in any cases in which injunctions would not issue *if no industrial dispute were involved.*"

This declaration, it is well known, was inspired and perhaps was drawn by Mr. Gompers, who has never ceased for the past ten years to assert before committees of Congress, and in public addresses everywhere, and in the magazine of which he is the editor, that precisely that discrimination by the federal courts existed, and that what he demanded was that it should be legislated against, until he had caused multitudes to believe that it was true, and perhaps had come to believe it himself.

That this is the meaning of the section is also shown by its legislative history. The reports of the committees, and even the debates in Congress, show that there was no intention of legalizing anything which was then illegal, but only to legislatively declare what was then legal. That the several acts specified in this section might be unlawful under certain circumstances was not denied, and the principles laid down by the Supreme Court in Aiken v. Wisconsin 195 U. S. 194 were recognized:

"No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if a step in a criminal plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

That this is the meaning of the section is also shown by the fact that, if it had been the intention of Congress *thereby* to amend the existing statutes of the United States, it would have repealed thereby *the Civil Service laws,* prohibiting the discharge, without cause, of the 200,000 employes in the various departments of the government, *the most vital provisions of the Interstate Commerce Act,* both as to the *carriers* and their *employes* in doing the work imposed upon them by it, under severe penalties, and *the Sherman Anti-Trust Act,* both as to employers and employes, which act the committees declared that they had left unchanged by the Clayton Bill.

That this is the meaning of the section is further shown by the fact, that any other construction of it would render it plainly unconstitutional, and the courts, in construing it, will not assume that it was the intention of Congress to pass laws that are invalid. The laws creating the courts of the United States give them general jurisdiction, concurrent with the courts of the several states, of all cases, at law or in equity, where the matter in demand ex-

ceeds $5,000 in amount, arising under the laws of the United States, and of controversies between citizens of different states, of like amount. And the fifth amendment of the federal constitution expressly declares that no person shall be deprived of his property without due process of law. Under the constitution and laws of the United States the citizens, who are parties to the several suits mentioned in this section, have the inalienable right to resort to the federal courts of equity for protection of their property, when assailed by any or all of the acts specifically enumerated therein, since, by such acts, such courts have heretofore uniformly held, that property and property rights may be unlawfully injured and destroyed. Congress could not, by a legislative fiat declaring that the injurious acts destructive of property were not unlawful, deprive them of their property. It would violate the 5th amendment of the federal constitution. Such a construction would also render the section invalid, because it would invade the judicial power of the federal courts of equity, which the constitution declares shall extend to all cases and controversies over which, by the statutes of their creation, they are given jurisdiction. For a statute to say that a court shall have equitable jurisdiction over a certain case or controversy, and then for another statute to deny it the power to judicially construe *previously existing statutes,* and also the fundamental essential power to issue and enforce the usual and necessary process required by its jurisdiction, would be a direct invasion by Congress of the judicial department of the government and totally void.

It would require a treatise to fully elucidate all this, but I have already extended this communication too long and must hurry to its conclusion.

Regulations Regulating Contempts.—Third and lastly. Let us take up sections 21, 22, 23, 24 and 25, which contain the regulations of the bill relating to contempts of the federal courts. These are confined within such a narrow compass that it is difficult to conceive of a case to which they will apply. They are in terms expressly limited to instances of disobedience by a person, not in the presence of the court, *or so near thereto* as to obstruct the administration of justice, of some *lawful* writ, process, order, rule, decree or command of a federal district court or of *any* court of the District of Columbia, not entered in a suit brought or prosecuted by or in behalf of the United States, which order, etc., *forbids him* to do any act or thing which is of such a character, *if done by him,* as would constitute also a criminal offense under any statute of the United States, or under the laws of the state where committed. Every other act of contempt than this one, so specified, is expressly, specifically and in terms excepted from the regulations prescribed. Since the supreme court has held that every act of disobedience of an order, *wherever committed,* which obstructs the administration of justice in a court, is committed *"so near thereto* as to obstruct the administration of justice," that it is the *disobedience* which obstructs, and that *the place* where it occurs is unimportant, whether nearby or 1,500 miles away, and legally cuts no figure, it would seem that the very exceptions made cut out from the regulations prescribed every case of contempt which their terms cover.

But assuming that there may hereafter arise some act of disobedience which does fall within the regulations of these sections, what changes, if any, do they make in the existing law and practice relating to the trial and punishment of it as a contempt? None whatever when such contempt occurs in any suit, not "within the purview of this act," which, by the other provisions of the bill, confines the regulations of these sections to those cases only which are brought under the anti-trust laws, and possibly the limited class of labor cases mentioned in section 20.

As to the cases *within the purview of this act,* section 22 provides that such trial

may be by the court or upon demand of the accused, by a jury; in which latter event the court *may* impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers *may* cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place, at which time a jury *shall* be selected and impaneled as upon a trial for a misdemeanor; and such trial *shall* conform, *as near as may be* to the *practice* in criminal cases prosecuted by indictment or upon information.

An attentive consideration of these various provisions will show that the decision whether the trial is to be by the court or jury is left within the discretion of the court, as it always has been, and that the proceedings at the trial, if a jury trial is had, will not differ from those heretofore pursued, and which are well shown in the case of In re Steiner, 195 Fed. 303, in which Judge Lacombe made the following order:

"The cause will be taken up for a hearing on Monday, May 27, at 10:30 a. m. As there may be conflicting testimony which will present a *question of fact* as to what was or was not done, there will be a jury in attendance to whom *may* be submitted such concrete questions of fact as may at the time seem desirable. This does not mean that the whole case will be tried by the jury. The trial is one for the court, but the court is willing to have a jury decide which of two or more opposing witnesses is truthfully stating the fact."

That the provisions of these sections in regard to a jury trial are *permissive* and not mandatory is shown by the history of the times. They were passed by a Democratic Congress in pursuance of a party pledge made in 1908 and repeated in 1912 as follows:

"We reiterate the pledge of our National platforms of 1896 and 1904 in favor of *the measure*, which passed the United States Senate in 1896, but which a Republican Congress has ever since refused to pass, relating to contempts in Federal courts and providing for trial by jury in cases of indirect contempt."

"The measure" here referred to was the bill unanimously reported on May 4th, 1896, by the Senate Judiciary Committee, through Senator David B. Hill, which contained the following provision; as to the trial of *all cases* of indirect contempt:

"But such trial *shall* be by the court, *or in its discretion* upon application of the accused a trial by jury *may* be had as in any criminal case."

This measure, as thus reported, passed the Senate on June 10th, 1896, in the closing hours of the session when there were only a few Senators present and in the midst of the hurry and confusion usual at such a time, but with an amendment thereto forced into it by two Senators, not members of the committee and not Democrats, striking out the words "in its discretion" and the word "may" and inserting in place of it the word "shall." This amendment was not considered to be a part of "the measure" which the Democratic convention approved of. For the provision as reported by the Senate Committee the Democratic party has since always stood, and on May 28th, 1900, when the Alaska Civil Code was pending before the House of Representatives, the Democratic Party in Congress offered "the measure" as a whole as an amendment, with this provision in it, as reported by the Senate Judiciary Committee as covering the whole subject of the trial of all cases of contempt, and failing in this, actually forced the above quoted provision that the trial "shall be by the court, or in its discretion, upon application of the accused, a trial by jury may be had as in any criminal case," into section 612 of the Code.

When the Democratic party finally got control of the lower house of Congress in 1911, the majority prepared and passed a bill regulating contempt proceedings, which failed in the Senate. The Judiciary Committee which had charge of the matter, had before it eleven bills relating to that matter, every one of which contained the positive requirement that in all cases of indirect con-

tempt "a trial by jury *shall* be had as in criminal cases." One of these bills was introduced by Mr. Clayton himself at the instance of the labor unions, whose counsel had prepared it. Moreover, during this entire period, innumerable bills to secure trials by jury in cases of indirect contempt had been introduced, at the instance of the labor unions, in the legislatures of nearly all the states, some of which were actually put upon the statute books in a few states, and every one of these bills use the imperative word "shall" instead of the word "may" in the provision for the trial by jury in such cases. All of this was well known to the Senate and House Committee, it having been brought to their attention by the opponents of such legislation.

When the Democratic majority prepared and reported its bill in 1912, it deliberately rejected the word "shall" contained in the bills which had been before it, and in all other bills which had ever been drawn to make a *trial by jury compulsory*, and inserted in lieu of it the permissive word "may."

Moreover, during this entire period the Supreme Court of the United States and the supreme courts of many states were rendering decision after decision to the effect that the requirement of a trial by jury in such cases would not only be destructive of the independence of the judiciary, and of its power to protect itself from insults and to secure obedience of its orders, but also that, to say the least, it would be of very doubtful constitutionality, because invasive of the independence of the judiciary.

The supreme court, in construing these sections, will assume that Congress intelligently made this change, and particularly that it heeded its suggestions, in this respect, so often made in its decisions, for the purpose of avoiding such doubts as to their constitutionality and a conflict with that court.

This principle of construction was adopted by the supreme court in Lincoln v. U. S., 202 U. S. 498, in which it said:

"Moreover, the Act of July, 1902, was passed with full knowledge and after careful consideration of the decisions of this court, and Congress was aware that grave doubts, at least, had been thrown upon its power to ratify a tax under circumstances like the present. De Lima v. Bidwell, 182 U. S. 199, 200. This affords a *special* reason for believing that if it had intended to encounter the limitations of that case, it would have done so *in clear words from which there was no escape.*"

Now, as early as May, 1895, just one year before Senator Hill reported from the Judiciary Committee the bill which it had so carefully considered, the supreme court in the Debs case, 158 U. S. 594, which decision was before the committee had said this:

"The power of the court to make an order carries with it the equal power to punish for a disobedience of that order, and inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

This decision was followed at intervals by numerous decisions of that court to the same effect until in May, 1911, it decided the case of Gompers v. Bucks Stove & Range Co., 221 U. S. 450, in which it specifically laid down the law as follows:

"The power of the courts to punish for contempt is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed upon them by law. Without it they are mere boards of arbitra-

tion, whose judgments and decrees would be only advisory. If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery. This power 'has been uniformly held to be necessary to the protection of the court from insults and oppressions, while in the ordinary exercise of its duties and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors, Bessette v. Conkey, 194 U. S. 324, 337. There has been general recognition of the fact that the courts are clothed with this power and must be authorized to exercise it without referring the issues of fact or law to another tribunal, or to a jury in the same tribunal. For if there was no such authority in the first instance, there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently, the courts could not administer public justice or enforce the rights of private litigants. Bessette v. Conkey, 194 U. S. 337. Congress, in recognition of the necessity of the case, has also declared (Rev. Stat. 725) that the courts of the United States 'shall have power to punish by fine or imprisonment contempts of their authority, including disobedience to any lawful order of the said courts.'"

It is not probable that the authors of these sections, with all this before them, used the word "may" as equivalent of the word "shall," or that they intended to make trial by jury in contempt cases compulsory in any instance. Moreover, that they gave full heed to the suggestions of the court and appreciated the folly of disregarding them is shown by the provisions of Section 24, by which they limited even the provisions which permitted such trials by jury to such narrow compass, that it is difficult to find a case within them. Indeed, this section evinces a *profound distrust* of jury trials in such cases, and I here quote it as follows:

"Sec. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or *so near thereto as to obstruct the administration of justice*, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name of, or in behalf of, *the United States*, but the same, and all other cases of contempt not specifically embraced within Section 21 of this Act, may be punished in conformity to the usages at law and in equity now prevailing."

Many other considerations could be adduced, drawn from the interpretation of such language by the Supreme Court and by other courts in contempt and other cases, and from the use of other expressions in these sections, such as this, "such trials shall conform *as near as may be* to the practice in criminal cases," which the Supreme Court has held to mean that *the matter to which they apply* is left within the discretion of the court, but enough has been said, I think, to satisfy anyone that the existing law as to the mode of trial is unchanged by these sections of the bill.

There is, however, in these sections, a provision which does change the existing law, and greatly increases the severity of the punishment which may be inflicted upon those who violate the injunctions of the courts in the cases to which these sections are supposed to apply. Under section 22, the court is at liberty to imprison the accused for a period of six months, and *also* to fine him $1,000, payable to the United States, and to *further* fine him, in amounts equal to the damage which his contempt has caused to the complainant or *any other party*, and to order that he stand committed until such fines are paid. This is an enormous extension of the power of the federal courts in contempt cases of this character, for heretofore their power to punish for contempt has been limited to a simple fine *or* imprisonment of the offender.

DANIEL DAVENPORT.

New York, N. Y.

CHATTEL MORTGAGE—AFTER ACQUIRED PROPERTY.

WILLIAMS v. NOYES & NUTTER MFG. CO.

Supreme Judicial Court of Maine. Dec. 5, 1914.

92 Atl. 482.

Under a chattel mortgage providing that the mortgagor might sell in the ordinary course of business, replacing the stock with new stock and keeping it to its present value, and that it covered all after-acquired property added to the business in any manner or during the existence of the mortgage, the mortgagee did not rely or intend to rely upon the agreement to sell from the stock and replace it with new stock, and, in view of what interested third parties might ascertain from inspection of the mortgage, he could take only such goods as he showed title to, which were in existence at the date of the mortgage or substituted for articles sold by purchase from the proceeds.

HANSON, J. Action of trover brought by the plaintiff, as trustee in bankruptcy of the estate of Alton G. Crockett, reported to this court for determination of the rights of the parties.

On September 10, 1910, Alton G. Crockett mortgaged his stock of goods, fixtures, and accounts to the defendant to secure an indebtness of $759.18. The value of the mortgaged property was then about $500. The mortgage contained the following provision as to after-acquired merchandise:

"It is understood that the said Crockett is to have the right to sell at retail in the ordinary course of business from said stock, replacing the same with new stock and additions from time to time, keeping the stock to its present value and insured for the benefit of the said mortgagee; and the said Crockett hereby sells and conveys to the said Noyes & Nutter Mfg. Co. all and singular all additions to merchandise, metals and stock, or accounts hereafter due for labor or material; and the same to be the property of the said Noyes & Nutter Mfg. Co., their successors or assigns. It being distinctly understood that this mortgage and conveyance covers all after-acquired property, added to said business in any manner after the date of this mortgage or during the existence of said mortgage, to Noyes & Nutter Mfg. Co. To have and to hold all and singular the said goods and chattels, property rights and interests to the said Noyes & Nutter Mfg. Co., their successors and assigns."

The parties continued their business relations until July 7, 1913, when Mr. Crockett was adjudicated a bankrupt. He then owed the defendant $1,229.69. The plaintiff was appointed trustee, qualified as such officer, and thereupon took possession of the merchandise in question. The inventory filed amounted to $921.28, which was later increased by sales from the stock not reported, aggregating $82.34, making $1,003.62 as the value of the bankrupt estate. The mortgage was not foreclosed, and the bankrupt was in possession of the property at the date of adjudication, and delivered the same to the trustee.

The defendant by its attorney, made demand upon the trustee for the goods, and, upon refusal, took the same forcibly from the plaintiff, and sold them.

Among the admissions and agreements made by counsel, two only are material:

(1) "That, in case judgment shall be rendered for the plaintiff, the damages shall be for the sum for which the defendant sold the goods, to wit, $460.64."

(2) "While the mortgage never has been foreclosed, the plaintiff waives that omission."

The plaintiff contends that: (1) "The mortgage is void because it was executed under duress." (2) "The terms of the mortgage are not sufficient to hold the property acquired subsequent to the execution of the mortgage; the trustee having taken possession thereof before the mortgagee, and Mr. Crockett having been adjudicated bankrupt." (3) The trustee's title is superior to that of the mortgagee, and the property passes to him for the benefit of the creditors of the bankrupt estate.

The defendant contends: (1) That there was no duress. (2) That, while this mortgage does not say in terms that new goods shall be bought with the proceeds from the sale of old, it is the plain intent of the parties and the necessary construction, because it says that Crockett had the right to sell from the stock, replacing the same with new stock, keeping the stock up to its present value, and cites Bell v. Jordan, 102 Me. 67, 65 Atl. 759, and Union Water Power Co. v. Lewiston, 95 Me. 171, 49 Atl. 878, as supporting its contention "that, in the construction of contracts, there is one fundamental rule or consideration, which is paramount to all others, and that is that the intention of the parties as gathered from the language of all parts of the agreement, considered in relation to each other, and interpreted with reference to the situation of the parties, and the manifest object which they had in view, must always be allowed to prevail, unless some established principle of law or sound public policy would thereby be violated;"

and further that "it is the manifest object of the parties in making this mortgage that the stock of goods should be kept up to its present value, and the only possible way to do it lawfully and properly would be to use the proceeds of the sale for that purpose;" and that the mortgage under consideration "does not differ from the ordinary mortgage of this kind where authority to sell is given to the mortgagor, and he covenants to use the proceeds thereof to purchase new goods of like kind, and to keep the stock up to a given value." (3) That the title to the goods was in the defendant, who had lawful right to possession of the same, as between the parties, and as against any third party who has not acquired superior equities by attachment or otherwise and the taking of possession. In effect defendant claims that the plaintiff, as trustee, acquired no right to possession of the goods, and that the burden of proving the kind, quality, and amount of goods in stock, and whether old or acquired after the date of the mortgage, is upon the plaintiff; that failing to do this, and for the further reason that the old and new goods were intermingled in such a manner as to render division impossible, the plaintiff cannot recover.

[, 2] The plaintiff's first contention is not supported by the evidence. The record discloses an attempt on the part of the defendant's agent to get security for a running account. Two demands for payment, at least, had been made by the defendant. The direct testimony on this point follows:

"Q. And what did Mr. Nutter tell you in regard to signing the mortgage? A. He was prepared to close me up unless I did sign the mortgage."

The cross-examination brings out general statements of "threats," but the words used appear to have been the same in substance as given in direct examination. We are unable to find that there was duress. The defendant went about the business in the usual way, employing language expressing his intention to sue and attach if security was not given. The bankrupt elected to make a mortgage, and for about three years thereafter carried on his business with the mortgage on his stock. The time involved negatives the claim of fraud or duress, and serves as a waiver of any right to now set up either claim.

The rights of all the parties, therefore, depend upon the language used in the mortgage in reference to after-acquired property and the act of the parties as disclosed by the record.

[3, 4] While at common law a mortgage of chattels not then in existence was invalid (Abbott v. Goodwin, 20 Me. 408; Head v. Goodwin, 37 Me. 181; Morrill v. Noyes, 56 Me. 458, 96 Am. Dec. 486), it has now become a settled principle in this state that a person may mortgage after-acquired property (Abbott v. Goodwin, supra, and cases cited); and, as between the parties, a mortgage upon goods, which authorizes the mortgagor to sell them, and with the proceeds of such sale to purchase other goods to take their place, will be upheld (Allen v. Goodnow, 71 Me. 420; Deering v. Cobb, 74 Me. 332, 334, 43 Am. Rep. 596). Something more than the authority given in the mortgage under consideration, or the actual acquiring of the new property, is necessary, where the rights of third parties intervene, as in the case at bar. Where the power sought to be created is ineffectual, the mortagee must be in actual possession of the property mortgaged, if he would defeat the claims of other creditors. Such mortgage, to have the effect contended for by the defendant, must contain apt words to designate the power to sell from the stock so mortgaged, and the further stipulation that the proceeds of such sale shall be applied to the purchase of new articles of like kind to those sold; the chattels so purchased to become substituted for those sold at the instance and under the authority of the mortgagee, so that the legal title to them may be said to pass to the mortgagee as effectually as if he had himself made the sale, by assent of the mortgagor, and with his own hand replenished the res. The mortgagor, by so doing, simply executes a power, performs a trust created by the mortgage, and thereby neither depletes the security nor defrauds his other creditors. Abbott v. Goodwin, 20 Me. 408; Sawyer v. Long, 86 Me. 541, 30 Atl. 111.

(5) It is not contended that the mortgage meets the requirements of the decided cases upon this element of the case at bar, but counsel urges that the mortgage should be so construed, as that is the plain intent of the parties and necessary construction, because it says that Crockett had the right to sell from the stock, replacing the same with new stock, keeping the stock up to its present value, and relies upon the doctrine of Bell v. Jordan, 102 Me. 67, 65 Atl. 759, and Union Water Power Co. v. Lewiston, 95 Me. 171, 49 Atl. 878, supra. The rule of construction emphasized in the cases cited that the intention of the parties, as gathered from the language of all parts of the agreement, considered in relation to each other, and interpreted with reference

to the situation of the parties, and the manifest object they had in view, must always be allowed to prevail, unless some established principle of law, or sound public policy, would thereby be violated, is peculiarly applicable in the case at bar.

As bearing upon the intention of the parties, a reading of the last clause of the stipulation under consideration demonstrates that the defendant did not rely or intend to rely upon the agreement to "sell from the stock, replacing the same with new stock," but went far beyond the purport of such stipulation even, and caused his mortgage to include these words:

"It being distinctly understood that this mortgage and conveyance covers all after-acquired property, added to said business in any manner after the date of this mortgage, or during the existence of said mortgage to Noyes & Nutter Mfg. Co., their successors and assigns."

In view of the many decisions of this court sustaining a mortgage of after-acquired property when such mortgage is properly drawn, when the rights of the parties, and particularly the rights of interested third parties, may be definitely known from inspection of the mortgage, or a record thereof, we hold that the defendant, in any event, could take under his mortgage only such goods or fixtures as he has shown title to, which were in existence at the date of the mortgage, and those substituted for articles sold by purchase from the proceeds of sales from such mortgaged stock. To hold otherwise would be "a violation of an established principle of law and sound public policy." Sawyer v. Long, supra; Allen v. Goodnow, 71 Me. 420; Deering v. Cobb, 74 Me. 332, 43 Am. Rep. 596; Williamson v. Nealey, 81 Me. 447, 17 Atl. 404; Dexter v. Curtis, 91 Me. 505, 40 Atl. 549, 64 Am. St. Rep. 266.

The trustee in bankruptcy had taken possession of the bankrupt's stock from the bankrupt. The defendant dispossessed the trustee. Had he that right?

(6-8) Where once the trustee is appointed, his title to the bankrupt's estate relates back to the date of the adjudication. 5 Cyc. 342. A trustee takes the property of the estate subject to all equities, liens, and incumbrances existing against it in the hands of the bankrupt. The plaintiff having taken possession, the property was then in the custody of the law, and could not be removed from that custody by any private person or by any process issuing out of this court. In Crosby v. Spear, 98 Me. 542, 57 Atl. 881, 99 Am. St. Rep. 424, two actions of replevin to recover possession of certain store fixtures which were in a bankrupt's possession at the time of his adjudication in bankruptcy, it was held that when a court, state or federal, has once taken into its possession a specific thing, no court, except one having supervisory control or superior jurisdiction in the premises, has a right to interfere with or change that possession. Jones on Mortgages (6th Ed.) 1231, 1232; Carney v. Averill, 110 Me. 172, 85 Atl. 494. See Chase v. Denny, 130 Mass. 566; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183.

(9) The case shows that the defendant's interest in the stock could not exceed $500, one of the conditions being that the mortgagor shall keep the stock to its present value, and the value of the stock when mortgaged did not exceed $500. He took from the plaintiff goods of the value of $1,003.62, and disposed of them. Aside from the question of amount of the original stock remaining and goods replaced, the defendant must account to the trustee for the excess in his hands over $500, which amount is greater than the judgment agreed upon.

(10) But the plaintiff may recover upon other grounds. The trustee was an officer of the law. He had possession of the goods, and his possession was the possession of the law. The defendant's right to follow the property, if it ever existed, was suspended on the appointment of the trustee. The trustee had acquired superior rights by virtue of his office. The defendant, not having possession of the goods, and having no right to possession as against the trustee, had the burden of showing title to the goods claimed by it under the mortgage, viz., such goods as were in existence at the date of the mortgage, and the goods, if any, substituted for articles sold by purchase from the proceeds of sales. It did not attempt to show either. It could not hold after-acquired goods because it did not have possession before the adjudication in bankruptcy. As to original goods on hand at the date of the mortgage, if any, the record is silent, and the trustee, who otherwise might have been able to determine the rights of all parties, was deprived of the only means of accomplishing that end by the act of the defendant in removing the goods and placing them beyond the reach of the trustees and all other parties in interest. The defendant, after such act, may not now invoke the aid of the court under the rule relating to personal property intermingled willfully or otherwise.

The case discloses that the bankrupt's business amounted to about $5,000 per year; that much of his stock was purchased upon credit from others than the defendant, and some goods were paid for in cash; that, of the stock at the date of the bankruptcy proceedings, one-third had been received from the defendant and two-thirds from other sources—the latter purchased largely upon credit, and not from sales from the mortgaged stock, a condition so inconsistent with the claim of the defendant's right to recover that further comment is unnecessary, save to say that from the nature of the stock and the general business of the bankrupt, the stock having been subject to sale for about three years, the inference necessarily arises that no part of the original stock was left at the date of proceedings in bankruptcy. In accordance with the stipulation, the entry will be:

Judgment for the plaintiff for $460.64.

NOTE.—*Limitation Upon the Rule of Mortgage of After-Acquired Property.*—The instant case it is perceived shows a mortgage, which requires the replacing of old stock sold with "new stock and additions from time to time," and it provides that "this mortgage and conveyance covers all after-acquired property, added to said business in any manner after the date of this mortgage or during the existence of said mortgage." Nevertheless, the court rules "that the defendant, in any event, could take under his mortgage only such goods or fixtures as he has shown title to, which were in existence at the date of the mortgage, *and those substituted for articles sold by purchase from proceeds of sales from such mortgaged stock.*" (Italics are ours.) This ruling seems a limitation against the express language of the mortgage, and to deny the right to mortgage after-acquired property, unless the future acquisition arises out of investment of funds coming from presently mortgaged property. It is to be noted also that there is no question in this case of possession taken by mortgagee in advance of attachment. Had that been done it is conceivable that the ruling would not have been as limited as it was. Burrill v. Whitcomb, 100 Me. 286, 61 Atl. 678, 1 L. R. A. (N. S.) 451. This case shows a mortgage on a stock of goods "and also all stock in trade, furniture and fixtures that may hereafter be acquired." The mortgagee took possession before levy of attachment, and his lien was sustained in accordance with the previous consent of the mortgagor expressed in the mortgage itself.

This rule seems approved by many cases, viz.: New England Nat. Bank v. Northwestern Nat. Bank, 171 Mo. 307, 71 S. W. 191, 60 L. R. A. 256; Rochester Distilling Co. v. Rosey, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 635; Re Allen, 65 Vt. 392, 26 Atl. 591.

The theory, however, of confining the mortgage to reinvestment of proceeds from sales is exemplified in Farmers' Loan & T. Co. v. Long Beach Improv. Co., 27 Hun. 89, where the claim was for purchase money.

In Wright v. Voorhees, 131 Iowa 408, 108 N. W. 758, 117 Am. St. Rep. 429, what is called "a blanket mortgage," it is strongly intimated, would not be enforceable. The court said: "The cases authorizing the inclusion of after-acquired property and future advances will all be found to come far short of a general inclusion of everything the mortgagor may subsequently own and every indebtedness to the mortgagee which he may subsequently incur."

Fidelity & Deposit Company v. Sturtevant Co., 86 Miss. 509, 38 So. 783, 109 Am. St. Rep. 716, speaks of appellant recognizing that "there are certain restrictions thrown around the doctrine that a party can give a valid mortgage on after-acquired property, and that he cannot mortgage generally all of his property to be acquired within a given time after the date of the instrument." It was said: "The mortgagor, having an actual interest *in presenti* in the subject of which the future acquisition was a product, may give a valid lien on the products of said property already owned by him, because such products, though not *in esse* have a potential existence."

See also Deeley v. Dwight, 132 N. Y. 59, 30 N. E. 258, 18 L. R. A. 298, where there is a note with many cases cited to the same effect. See also Shores v. Doherty, 65 Wis. 153, 26 N. W. 577; Moore v. Terry, 66 Ark. 393, 50 S. W. 998.

The ruling made in the instant case, we think supported by the great weight of authority, but perhaps not applicable where possession is taken with the present consent of mortgagor, but possibly not where there is previous consent expressed in the mortgage. Nevertheless, the act of taking possession by mortgagee, whether by consent previously or presently given is considered very effective in the curing of defective mortgages.

C.

ITEMS OF PROFESSIONAL INTEREST.

REPORT OF THE MEETING OF THE RHODE ISLAND BAR ASSOCIATION.

Some very interesting reports of the meeting of the bar association of Rhode Island, on December 7th, 1914, have been sent us by our esteemed correspondent and subscriber, Judge Thomas Z. Lee, of Providence.

The meeting was held at the Turks Head Club in Providence. Previous to the dinner and addresses the annual meeting of the association was held, at which the following officers were elected: President, Richard B. Comstock; Vice-Presidents, William P. Sheffield and Cyrus M. Van Slyck; Secretary, Howard B. Gorham; Treasurer, James A. Pirce; Executive Committe, Herbert A. Rice, Frederick Rueckert, John P. Beagan, T. F. I. McDonald and James C. Collins.

Judge Frederick Rueckert, chairman of the special committee on the revision of the crim-

inal laws, reported that the committee had presented a bill to the last legislature, which failed of passage, despite the committee's recommendations. It was voted that the report of this committee be approved and that another effort be made to secure the enactment of the proposed amendments at the next session of the General Assembly.

Following the adjournment of the business meeting, the members and guests were ushered into the dining hall of the club, where a full course dinner was provided. During the meal an orchestra played a medley of popular airs, in which the entire assemblage joined with their voices. The most popular seemed to be "It's a Long, Long Way to Tipperary," which was frequently played and as frequently encored.

Seated at the head table were President Richard B. Comstock, retiring President, Charles C. Mumford, Chief Justice Clarke H. Johnson and Justices Darius Baker and William H. Sweetland of the Supreme Court, Presiding Justice Willard B. Tanner and Associate Justices Chester W. Barrows, John W. Sweeney, George T. Brown and Charles F. Stearns, of the Superior Court, former Chief Justice Charles Matteson and the two speakers of the evening.

The principal addresses were delivered by Dean Ezra R. Thayer, of the Harvard Law School, and Dean Talcott Williams, of the School of Journalism of Columbia University.

Dean Williams' address was on the subject of "The Neutrality of Belgium," upon which subject he said in part:

"The violation of the neutrality of Belgium by Germany is not to be considered alone or with reference to the fate of Belgium, but as a part of the great movement which the passage of the German troops across the Belgian frontier interrupted, but cannot defeat.

"Belgium is not the only neutralized state. For a century the world has been moving steadily forward along the path of creating great territories and small states, which treaties and the common agreement of nations preserve from war by neutralizing.

"The Monroe Doctrine itself is at bottom and in essence a declaration by the United States of the neutralization of Latin-America so far as the Powers of Europe are concerned. The whole Western Hemisphere, in a large sense, is a half of the world from which the United States proposed to exclude invasion from beyond the oceans and to secure peace in both continents, and all their islands and the isthmus which joins them.

"The pledge which Secretary Hay asked all the nations of the world to sign to protect the administrative entity of China was a step toward the neutralization of 4,000,000 square miles and 400,000,000 people.

"This steady movement and expansion of the principle of neutralization, and the increase of areas of peace has been in progress for just a century. The issue raised by the violation of the neutralization of Belgium is not a question limited to that country, but whether a great world movement, in which all nations have joined, shall be halted and destroyed by the act of one."

Judge Thayer's argument was on the subject of "Liberalizing the Rules of Evidence." After considering the many branches of this part of the law, Dean Thayer urged that more power and discretion be given the judges, making them more judicial and less administrative. "You must either trust your judges," said he, "or fear their caprice and discretion. Judges do not rule on the evidence of a book, but rather upon their own judgment and the peculiar circumstances surrounding each case and each witness." The entire lack of rules relating to evidence was not advocated, but rather that more should be left to the judges' discretion.

REPORT OF MEETING OF THE NEBRASKA STATE BAR ASSOCIATION.

The annual meeting of the Nebraska State Bar Association was held at Lincoln on Monday and Tuesday, December 28 and 29, 1914. Aside from the regular routine business and reports of the various committees, the program included the following addresses:

"The Courts and Constitutional Restraints," by the president, Mr. H. H. Wilson.

"Lawyers and Law Reform," by Judge E. B. Perry, of Cambridge, Neb.

"A Unified State Court System," by Mr. Herbert Harley, of Chicago.

"The Function of the Court in Jury Trials," by Mr. Wm. A. DeBord, of Omaha.

CORRESPONDENCE.

WHEN THE STATE PRACTICES LAW.

Editor Central Law Journal:

Is the state about to hang out its shingle, "Attorney at Law?" Is the lawyer being undermined? Can the state overthrow as of naught the ethics which the lawyer is bound to obey?

Corporations are enjoined from soliciting legal business; or, at least, the practice is condemned, and some states inflict punishment.

But, suppose the state practices law; or the very courts practice law in cases on hearing before them—what then?

Let us see.

For example, on the face of the summons in fourth class suits in the Municipal Courts of Chicago, appears: "Notice—Any defendant wishing information as to what steps it may be necessary for him to take for the purpose of making a defense, may obtain the same by making inquiry at the clerk's office." "The attention of the defendant is also called to the following provisions of the Municipal Court Act, section 43 (advice to litigants in bad rhetoric). Section 44 provides, among other things, that the clerk of the Municipal Court shall furnish suitors blank forms of all court papers."

No other court gives so much voluntary information to litigants as the above shows. But the municipal courts are not to blame; the legislature has made it obligatory.

That is, the state of Illinois is in the practice of law.

So, what more may be expected of the state's agents—judges of the municipal courts, clerks, bailiffs too, than that they should take a hand at the practice of law by advising and assisting litigants to make out their legal papers when their suits come up in court?

On the other hand, the best Christmas present the lawyer can give to his clients is, "Everybody his own lawyer." Such a book booms the lawyer's business.

Worse and more of it: "Conciliation" courts are now proposed. These will do away with lawyers altogether.

ELMER E. ROGERS.

Chicago, Ill.

HUMOR OF THE LAW.

Judge—What is your age, madam?

Witness—Twenty-seven and some months.

Judge—I want your exact age, please. How many months?

Witness—One hundred and twenty.

A gentleman who once served on an Irish jury tells an amusing story of his experiences. When the hearing was over and the jury retired to their room to consider their verdict, they found that they stood eleven to one in favor of an acquittal, but the one happened to be a very complacent old gentleman who rested his chin upon the head of a thick bamboo cane, and announced defiantly that he was ready to stay there as long as any of them.

The hours dragged on, evening arrived, and the old gentleman obstinately held out. The other jurors wearily arranged themselves to make a night of it. From time to time the old gentleman would contemplatively suck the head of the cane.

Finally he fell asleep, and the cane dropped heavily to the floor. Then one of the jurymen picked it up and found, to his surprise, that it was nearly full of Irish whiskey. The eleven passed the cane around, relieved it of its contents, and then awakened its slumbering owner. Slowly he lifted the cane to his mouth, looked at his watch, and then arose with the announcement, "Boys, I'm afther changin' me moind."—Legal Laughs.

As everybody knows, an English judge wears in court a great wig and a gown, and is addressed as "my lord." Public sentiment scarcely allows him to unbend, even out of court. Nevertheless, sometimes he does unbend.

It is related that Sir Henry Hawkins, who was so prominent in the prosecution of the famous Tichborne claimant, and who was afterwards a famous judge, was in the habit of wearing his hair extremely short.

He was once waiting for a train at the Epsom railway station on a race day, and a number of roughs came in. One of them behaved very badly to the judge, who remonstrated with him; and thereupon the rough invited Sir Henry to come out and "have it out with him."

The judge reflected that, as the men appeared to be of the criminal classes, some of the party might have appeared before him and would know him. So he took off his hat and said:

"Perhaps you do not know who I am."

His assailant looked at the closely cropped head, and edged off, 'S' help me, Bob!" he exclaimed, "a bloomin' prizefighter! Not me!"

The judge was not molested further.

On another occasion, Sir Henry on a ramble between assizes with a companion, stopped at a wayside inn, and joined in a game of skittles with two rustics. In an unguarded moment the judge took off his moleskin cap. One of the rustics, after eyeing him suspiciously, turned to go away.

"I don't mind being neighborly," said he, "but I'm hanged if I am goin' to play skittles with a ticket-of-leave man!"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Bankruptcy**—Breach of Contract.—Where a bankrupt contracted to furnish livery and baggage service to a hotel and pay $21,000 in monthly installments for five years and became a bankrupt, the hotel association could file a claim for damages for anticipatory breach of the contract.—In re Frank E. Scott Transfer Co., U. S. C. C. A., 216 Fed. 308.

2.——Composition.—The burden of sustaining specifications of objection to the confirmation of an offer of composition, rests on the objecting creditors.—In re Rivkin, U. S. D. C., 216 Fed. 218.

3.——Fraud.—Where a majority stockholder of a corporation, with knowledge of its precarious financial condition, agreed to sell to the corporation its stock of a par value of $5,100 for $2,000, receiving $500 cash and notes secured by a deed of trust covering all the corporation's assets for the balance, the transaction was fraudulent as against the corporation's creditors and void as against its trustee in bankruptcy.—M. V. Moore & Co. v. Gilmore, U. S. C. C. A., 216 Fed. 99.

4.——Jurisdiction.—When property has become subject to a bankruptcy court, jurisdiction exists to determine the extent and character of liens thereon and rights therein, and to bring in additional parties when necessary to a complete determination of a matter in controversy.—In re National Boat &Engine Co., U. S. D. C., 216 Fed. 208.

5.——Preference.—Preferential payments by the bankrupts to bona fide creditors are not ground for refusing confirmation of a composition.—In re Rivkin, U. S. D. C., 216 Fed. 218.

6.——Preference.—Among the essential elements of a preference voidable under Bankr. Act, are insolvency of the transferror at consummation of the preference, and a reasonable cause for the person receiving the preference to believe that a preference was intended.—Kentucky Bank & Trust Co. v. Pritchett, Okla., 143 Pac. 338.

7. **Banks and Banking**—Joint Note.—Where defendant and another executed to a bank a joint note for $3,500, the bank on maturity of the note was entitled to apply defendant's general deposit to its payment; and it was immaterial that the bank had no demand or set-off against the other joint maker, nor could defendant complain that suit was not brought for the whole amount of the note, but only for the balance due.—Rush v. Citizens' Nat. Bank, Ark., 169 S. W. 777.

8. **Bills and Notes**—Accommodation.—A note secured by a trust deed made by a wife upon her husband's representation that he could procure a loan from an estate for which he was trustee is not "accommodation paper," though he procured the loan elsewhere.—Burr v. Beckler, Ill., 106 N. E. 206.

9. **Carriers of Goods**—Delay.—While a consignee of poultry, which was injured by defendant's delay, cannot recover for the physical injuries to the birds unless he gives notice before delivery, as required by the bill of lading, he may recover for damages occasioned by the depreciation in the market price before delivery.—Jett & Brooks v. Southern Ry. Co., Tenn., 169 S. W. 767.

10.——Partners.—In the absence of any arrangement constituting carriers partners or joint and several undertakers, each carrier except the initial carrier in an interstate shipment under the Carmack amendment is liable only for loss or injury on its own line.—Chicago, R. I. & P. Ry. Co. v. Harrington, Okla., 143 Pac. 325.

11. **Carriers of Passengers**—Bailee.—Where a car porter carried plaintiff's suit case out of the car at destination, and when plaintiff alighted the case was gone, the carrier was not liable as a carrier, but at most as a bailee.—Union Pac. R. Co. v. Grace, Wyo., 143 Pac. 353.

12. **Commerce**—Articles in.—The sending of means of education by correspondence through the mails is commerce.—Cheney Bros. Co. v. Commonwealth, Mass., 106 N. E. 310.

13.——Explosives.—A shipment of explosives in interstate or foreign commerce while in course of transportation is subject exclusively to the regulations prescribed by the Interstate Commerce Commission, and state or local laws have no application to it.—Actiesselskabet Ingrid v. Central R. Co. of New Jersey, U. S. C. C. A., 216 Fed. 72.

14.——Intoxicating Liquor.—The Webb-Kenyon Act, relative to the interstate shipment of intoxicating liquor, is not violated where the liquor is intended for the personal use of the consignee.—Adams Express Co. v. Commonwealth, Ky., 169 S. W. 603.

15.——Intoxicating Liquor. — Where liquor was ordered by intestate in Arkansas from a dramshop keeper in Missouri, where sales on credit were declared void, there was no interference with interstate commerce.—Landrum v. Lindsey, Ark., 169 S. W. 801.

16.——State Regulation.—Congress has not, by the Interstate Commerce act, taken over the whole subject of terminals, and orders of the Railroad Commission for interchange of business at a terminal in the state are valid.—Vandalia R. Co. v. Public Service Commission, Ind., 106 N. E. 371.

17. **Conspiracy**—Indictment.—The dismissal of an indictment against one of two conspir-

ators does not prevent a conviction of the other under the rule that two guilty persons are necessary to a conspiracy.—Rutland v. Commonwealth, Ky., 169 S. W. 584.

18.——Overt Act.—Conspiracy to commit a crime against the United States, denounced by Rev. St. § 5440, is distinguishable from the common-law offense in that it requires an overt act, which when committed completes the offense, without reference to the ultimate success of the conspiracy.—Ryan v. United States, U. S. C. C. A., 216 Fed. 13.

19. **Contracts**—Breach of.—No action can be maintained for breach of a contract so indefinite that it is impossible to ascertain with reasonable certainty the intent of the parties. —Central Mortgage Co. v. Michigan State Life Ins. Co., Okla., 143 Pac. 175.

20.——Compounding Crime.—A contract having for its sole purpose the recovery of stolen property, even by a compromise of the civil liability, is not illegal as compounding a criminal offense.—Rieman v. Morrison, Ill., 106 N. E. 215.

21.——Consideration.—The payment of a valid debt by one who owes it can constitute no consideration for a promise by the creditor. —Village of Seneca Falls v. Botsch, 149 N. Y. Supp. 320.

22.——Dispute.—When the terms of an oral contract are in dispute, the whole conversation concerning the trade and the various negotiations leading up to it are, as a general rule, admissible.—Ross v. Reynolds, Me., 91 Atl. 952.

23.——Impeachment.—One who in the full possession of all his faculties signs a written or printed contract without reading the same, although having full opportunity to do so, cannot impeach it by parol on the ground that he intended to sign something different—Hickman v. Sawyer, U. S. C. C. A., 216 Fed. 281.

24.——Public Policy.—Where plaintiff, not having been properly licensed, contracted with defendant school district to teach a school, the parties were in pari delicto, and the district could not recover money paid for services under the contract.—School Dist. No. 46 of Sedgwick County v. Johnson, Colo., 143 Pac. 264.

25. **Conversion** — Reconversion. — "Reconversion" means the putting of money into land, or land into money.—Mattison v. Stone, S. C., 82 S. E. 1046.

26. **Corporations** — Accommodation Guarantor.—A corporation cannot ordinarily become bound as an accommodation guarantor, and its naked promise as surety or guarantor with or without an independent consideration cannot be enforced.—In re Romadka Bros. Co., U. S. C. C. A., 216 Fed. 113.

27.——Charter Powers.—Corporations exercise only such powers as are expressly or by necessary implication granted, and such as are necessary to effect those powers which are granted.—National Mercantile Co. v. Mattson, Utah, 143 Pac. 223.

28.——Stockholder Liability.—Where claimant was fraudulently induced to purchase certain stock in defendant company by promises of large dividends, high-salaried employment, and a block of common stock as a bonus, and he proclaimed his status as a stockholder until after the appointment of a receiver for the company, he was not entitled to rescind and to be regarded as a creditor.—Bank of North America v. Pennsylvania Oil Refining Co., U. S. D. C., 216 Fed. 377.

29. **Criminal Evidence** — Admissibility. — Where defendant and D were arrested for killing decedent, evidence that, while in jail, D stated that he and not defendant killed decedent was inadmissible as hearsay.—People v. Raber, Cal., 143 Pac. 317.

30.——Stenographic Notes.—The state may introduce in evidence stenographic notes of the testimony of a witness given at a former trial, where such witness is without the state and not available.—Henwood v. People, Colo., 143 Pac. 373.

31. **Criminal Law**—Accomplice.—A conviction may be had on the uncorroborated testimony of an accomplice if it satisfies the jury beyond a reasonable doubt of the guilt of accused.—People v. Spira, Ill., 106 N. E. 241.

32.——Attempt.—An attempt to commit a crime consist of an intent to commit it and a direct ineffectual act done towards its commission.—People v. Petros, Cal., 143 Pac. 246.

33.——Circumstantial Evidence.—Where an unlawful killing and defendant's participation therein were affirmatively shown by defendant's own testimony, instructions, applicable to circumstantial evidence only, that a conviction was not warranted unless the proof was inconsistent with any theory other than that of defendant's guilt were properly refused.—People v. Raber, Cal., 143 Pac. 317.

34.——Evidence.—Depravity of character and abandoned habits are not in themselves evidence of insanity, nor is the commission of an unnatural or atrocious crime necessarily evidence thereof.—People v. Spencer, Ill., 106 N. E. 219.

35.——Incest.—In a prosecution for incest, prior acts of intercourse between the parties, a stepfather and his young stepdaughter, are admissible as original evidence.—Vickers v. State, Tex., 169 S. W. 669.

36. **Damages**—Husband and Wife.—Where defendant sold soda pop, to be retailed in a business owned jointly by plaintiff and her husband, there was sufficient privity between plaintiff and defendant for her to maintain an action for injuries received by the bursting of a bottle, though plaintiff might not be a partner with her husband and was merely acting under his direction.—Colyar v. Little Rock Bottling Works, Ark., 169 S. W. 810.

37.——Profits.—Profits growing out of a contract, and lost by reason of its breach, and which are ascertainable by calculation, are recoverable as damages.—Wilkes v. Stacy, Ark., 169 S. W. 796.

38. **Death**—Presumptive. — The unexplained absence of a person for more than seven years is prima facie, but not conclusive, evidence of his death.—Thompson v. Millikin, Kan., 143 Pac. 430.

39. **Deeds**—Condition Subsequent.—Where a deed conveys only an easement and not the fee, the right to maintain an action of forfeiture for breach of a condition subsequent is not limited to the grantor or his heirs, but may extend to the assignee of the grantor.—Stevens v. Galveston, H. & S. A. Ry. Co., Tex., 169 S. W. 644.

40.——Condition Subsequent.—Courts will not construe the language in a deed into a condition subsequent, unless, construed strictly, it will admit of no other reasonable interpretation.—Inhabitants of Town of Frenchville v. Gagnon, Me., 91 Atl. 951.

41. **Descent and Distribution** — Personal Property.—An heir cannot sue to recover the personal property of the intestate, but such action must be maintained by the personal representative.—Martin v. Franklin, Ky., 169 S. W. 599.

42. **Divorce**—Disavowal of Love.—Discourtesy, such as denial of social intercourse, disavowal of love, and expression of hatred, while the parties reside together, the husband providing support and the wife performing the ordinary household duties, is not alone ground for divorce.—Wills v. Wills, W. Va., 82 S. E. 1092.

43.——Modification of Decree.—After death of plaintiff, to whom custody of a minor child has been awarded, the divorce decree may be modified by giving such custody to defendant on motion made in the divorce action without revivor.—Purdy v. Ernst, Kan., 143 Pac. 429.

44. **Easements** — Abandonment. — Abandonment of an easement may be inferred from circumstances or from long-continued neglect, and lapse of time and nonuser are competent evidence of an intent to abandon.—New York, N. H. & H. R. Co. v. Cella, Conn., 91 Atl. 972.

45.——Way of Necessity.—Where a landowner granted land, wholly inclosed by other land belonging to him, for use as a school, the grant carried with it a way of necessity across the grantor's land—Board of Sup'rs of Lamar County v. Elliott, Miss., 66 So. 203.

46. **Election of Remedies**—Inconsistency.—That petition, claiming ownership, asked that the deed by which plaintiff had conveyed the land be set aside, and also alleged that the land had been reconveyed to her, did not require election, as invoking inconsistent remedies by setting up title and denying titel.—McClellan v. McClellan, Ga., 82 S. E. 1069.

47. **Equity**—Decree.—There is no rule in equity that the court shall in its decree find all the facts necessary to sustain the decree, except where in the absence of a finding of facts it would be impossible to tell what the decree in fact meant.—Liebig v. Matthews, U. S. C. C. A., 216 Fed. 1.

48.——Judicial Notice.—To authorize a court to sustain a demurrer to a bill by reason of matters of which it takes judicial notice requires a very clear case.—United States v. Mackey, U. S. C. C. A., 216 Fed. 126.

49.——Laches.—While the lapse of time is an element which courts of equity consider in sustaining ro refusing to sustain the defense of laches, time alone ordinarily is not sufficient to constitute the defense, but, in addition thereto, the situation of the parties must have so changed as to render the prosecution of the suit inequitable.—Schwartz v. Loftus, U. S. C. C. A., 216 Fed. 320.

50.——Rescission.—One who has been induced by the fraud of nonresidents to exchange certain stock for bonds is not required to go into another state and there sue for a rescission on pain of being held guilty of laches.—Page Belting Co. v. F. H. Prince & Co., N. H., 91 Atl. 961.

51. **Estoppel**—Fraud.—A fraudulent intent is not necessary to estoppel, but it is enough that, but for it, a fraudulent effect would result.—Helwig v. Fogelsong, Iowa, 148 N. W. 990.

52. **Evidence**—Admissibility.—In an action by a trustee in bankruptcy to recover insurance upon a stock of goods, which was burned after the petition in bankruptcy was filed and before adjudication, a declaration which one of the stockholders of the bankrupt corporation made after the adjudication, that he procured another to burn the property, is not admissible as a declaration against interest.—Hamburg-Bremen Fire Ins. Co. of Hamburg, Germany, v. Ohio Valley Dry Goods Co.'s Trustee, Ky., 169 S. W. 724.

53.——Experts.—Neighbors and friends may, without qualifying as experts, in an action against an administrator for services to deceased, testify to the value of services.—Moore's Adm'r v. Pierce, Ky., 169 S. W. 620.

54.——Mailing Letter.—The mailing of a letter properly addressed and stamped makes a prima facie case of delivery in due course of mail.—National Live Stock Ins. Co. v. Wolfe, Ind., 106 N. E. 390.

55.——Telegram.—Where an original telegram was outside the court's jurisdiction, a copy was admissible.—Spaulding v. Smith, Tex., 169 S. W. 627.

56. **Executors and Administrators**—Stockholder Liability.—The administratrix of a decedent is a necessary party to a suit to establish and enforce the statutory liability of the estate as owner of stock in an insolvent corporation.—Schwartz v. Loftus, U. S. C. C. A., 216 Fed. 320.

57. **False Pretenses**—Confidence Game.—In a prosecution for obtaining money by means of a confidence game whereby the complaining witness was induced to bet on the races and was defrauded, evidence that accused and his confederates had by the same means defrauded another is competent for the purpose of showing accused's guilty knowledge.—People v. Strosnider, Ill., 106 N. E. 229.

58. **Fixtures**—Intention.—There is no well-defined general rule by which the legal character of fixtures may be determined; it depending on the relation of the litigants, the kind and use of the property, and the intention of the owner, rather than the permanent annexation to the freehold.—Henry Clay Fire Ins. Co. v. Barkley, Ky., 169 S. W. 747.

59. **Fraud**—Misrepresentation. — A representation as an inducement to the sale of a secondhand automobile, as to its age, or the length of time it had been used, is material, and, if false, is actionable.—Ross v. Reynolds, Me., 91 Atl. 952.

60.——Presumption.—Fraud is never presumed, and, being criminal in its nature, must be clearly proved, but may be inferred from facts proved.—J. M. Robinson Norton & Co. v. Stalcup, Ind., 106 N. E. 395.

61. **Fraudulent Conveyances**—Homestead.—A conveyance of a homestead is not subject to attack as fraudulent.—Farmers' & Merchants' Bank v. Daiker, Iowa, 148 N. W. 1020.

62.——Reconveyance.—A reconveyance by a mother of land conveyed to her by her daughter, which she agreed to hold in trust, after a levy under an execution against the mother, could not be assailed by those claiming under the execution.—J. M. Robinson Norton & Co. v. Stalcup, Ind., 106 N. E. 395.

63. **Guaranty**—Notice of Acceptance.—Where a guaranty is to become binding on the signers only after notice of acceptance, it is not necessary that such notice be given directly by the guarantees, but any notice that they are acting on the faith thereof, derived from other sources, is sufficient.—Asmussen v. Post Printing & Publishing Co., Colo., 143 Pac. 396.

64. **Highways**—Abandonment. — An "abandonment" of a highway involves more than mere nonuser, it requires also an intent on the part of the public to abandon, and is not effected by obstructions or encroachments, or by failure to keep the highway in repair.—McCarl v. Clarke County, Iowa, 148 N. W. 1015.

65. **Homicide**—Conspiracy. — Where defendant and two others conspired to rob decedent of her jewelry and money, and during the process one of the conspirators killed decedent while defendant searched for valuables, defendant was guilty of murder, though he took no part in the actual killing.—People v. Raber, Cal., 143 Pac. 317.

66.——Procuring Miscarriage.—One who, in an unlawful attempt to produce a miscarriage, inflicts injury upon a woman, from which she dies, is guilty of murder in the second degree.—State v. Moon, Iowa, 148 N. W. 1001.

67. **Husband and Wife** — Maintenance. — Where the difference between a husband and wife, which resulted in the husband's leaving home, were caused by the wife's ill health and the husband's failure to make demonstrations of his affection, although his wife was very high-strung and exacting, the wife is properly granted an allowance for maintenance of herself and infant child.—Hodgen v. Hodgen, Ky., 169 S. W. 713.

68. **Indemnity**—Measure of Damages.—The measure of damages for breach of a contract of indemnity is not the amount of liability incurred, but the amount actually paid by the personal indemnified on account of the loss.—In re Lathrop, Haskins & Co., U. S. C. C. A., 216 Fed. 102.

69. **Insane Persons**—Disaffirmance.—The rule that a minor after becoming of age may disaffirm a conveyance made during his minority by bringing ejectment for the premises does not necessarily apply in all cases and in all circumstances to deeds of insane persons.—Walton v. Malcolm, Ill., 106 N. E. 211.

70. **Insurance**—Change of Title.—That one person acquired all the shares of a mercantile corporation was not a change of title which would avoid an insurance policy issued in favor of the corporation.—Hamburg-Bremen Fire Ins. Co. of Hamburg, Germany, v. Ohio Valley Dry Goods Co.'s Trustee, Ky., 169 S. W. 724.

71. Incontestability.—A clause in an insurance policy that it should be incontestable after one year bars a defense after that period on the ground of fraud in procuring the insurance.—Weil v. Federal Life Ins. Co., Ill., 106 N. E. 246.

72.——Waiver.—Where insurer investigates liability, and then rejects claim and denies liability, clause making loss payable 60 days after proofs held waived, and an action may be brought at once.—National Live Stock Ins. Co. v. Wolfe, Ind., 106 N. E. 390.

73. **Joint Adventures**—Secret Profit.—Where persons assume the relation of joint adventurers neither is allowed to make a secret profit out of the undertaking.—Selwyn & Co. v. Waller, N. Y., 106 N. E. 321, 212 N. Y. 507.

74. **Judgment**—Res Judicata.—Where work under a contract was stopped by mutual consent, and plaintiff recovered for work done, when there had been no breach of contract by either party, the judgment was not res judicata as to his right to subsequently recover for loss of profits.—Dreyer v. McCormack Real Estate Co., 149 N. Y. Supp. 322.

75. **Judicial Sales**—Confirmation. — Although a judicial sale of land has been confirmed, and a writ of possession awarded, the purchasers have not the legal title, until conveyance is made to them by the commissioner.—Likens v. Pate, Ky., 169 S. W. 734.

76. **Kidnapping**—Surrender of Control.—A father, who by agreement surrendered the custody of his minor child to his wife, is not guilty of kidnapping, because he enticed the child away from the custody of the mother.—State v. Powe, Miss., 66 So. 207.

77. **Landlord and Tenant** — Mortgage. — Where a lease required the lessee to erect certain buildings upon the premises, they to be his property at the end of the term, the lessee could mortgage such buildings, and the mortgagee succeeded to the lessee's right of removal.—Oregon-Washington R. & N. Co. v. Eastern Oregon Banking Co., Wash., 143 Pac. 154.

72. **Life Estates**—Waste.—A tenant may without becoming liable for waste, do what is required for the proper enjoyment of his estate to the extent that his acts and managements are sanctioned by good husbandry in the locality in which the land is situated.—Thomas v. Thomas, N. C., 82 S. E. 1032.

79. **Limitation of Actions**—Cross-Complaint. —A defendant may set up in cross-complaint a cause of action which was not barred by the statutes of limitations at the time the plaintiff's action was filed, and such cause of action does not become barred by the statute during the plaintiff's action.—Zink v. Zink, Ind., 106 N. E. 381.

80. **Master and Servant**—Assumption of Risk. —Where a servant as representative of the master is in control of the place of work and himself undertakes its performance, he assumes, not only the dangers that are obvious, but also such as ordinary care in inspecting the place could have enabled him to discover.—Louisa Coal Co. v. Hammond's Adm'x, Ky., 169 S. W. 709.

81.——Assumption of Risk.—The rule that an employe in a gravel pit takes the chance of injury from the falling of the embankment does not apply where the embankment consists of such material that it may reasonably be expected not to fall.—Dimetre v. Red Wing Sewer Pipe Co., Minn., 146 N. W. 1078.

82.——Intervening Cause.—Where an employer employed a negligent system of operating its mill, a fellow servant's negligence in using or applying such negligent system was not, as matter of law, an independent intervening cause defeating a recovery by an injured employe.—Donnelly v. Ft. Dodge Portland Cement Corporation, Iowa, 148 N. W. 982.

83.——Respondeat Superior.—A master is liable for injuries from the negligence of a fellow servant occupying such a relation to the injured party or to his employment as to make his negligence the negligence of the master.—Steele v. Grant, N. C., 82 S. E. 1038.

84.——Statutory Duty.—Recovery by a miner injured by impure air caused by the failure of a mine operator to comply with the statutes regulating ventilation cannot be defeated because he drove, at the operator's direction, a shaft ahead of the air shaft.—Log Mountain Coal Co. v. Crunkleton, Ky., 169 S. W. 692.

85.——Substantial Compliance.—Performance of an employment contract must be substantial compliance, except that non-performance is excused when caused by the fault of the other party.—Johnson v. Bass, Ga., 82 S. E. 1053.

86. **Mortgages**—Assignment.—Where a mortgagee in possession conveys the property by deed it operates as an assignment of the mortgage.—Farnsworth v. Kimball, Me., 91 Atl. 954.

87.——Judgment Creditor.—No person in the line of redemptioners nor an intermeddler, may, by tender of payment of a judgment, impair or destroy a judgment creditor's right to use the judgment to effect redemption.—Orr v. Sutton, Minn., 149 N. W. 1066.

88.——Redemption.—A purchaser at an execution sale, under a judgment rendered against a mortgagor subsequent to the making of the mortgage, may redeem from the mortgage, notwithstanding a conveyance after the execution sale by the mortgagor to the mortgagee.—Cowing v. Britt, Ark., 169 S. W. 783.

89. **Municipal Corporations**—Classification. —Cities are entitled to make reasonable classification of grants and privileges, and may attach dissimilar conditions and impose dissimilar burdens on each class.—Postal Telegraph Cable Co. v. City of Newport, Ky., 169 S. W. 700.

90.——Special Assessment.—That a street 180 feet wide is improved only to a width of 60 feet at its center does not divest an abutting owner from his character as such nor relieve him from liability for an assessment for the improvement.—Wing v. City of Macon, Ga., 82 S. E. 1062.

91. **Negligence**—Nuisance.—One engaged in a lawful business, which does not create a nuisance, is not liable for an incidental injury to another, resulting therefrom, without proof of negligence or fault on his part.—Actiesselskabet Ingrid v. Central R. Co., of New Jersey, U. S. C. C. A., 216 Fed. 72.

92.——Proximate Cause.—Two causes may both be proximate or may so concur or unite as to be together the proximate cause of an injury, and in such case neither cause releases the party responsible for the other cause of liability.—Donnelly v. Ft. Dodge Portland Cement Corporation, Iowa, 148 N. W. 982.

93.——Proximate Cause.—To constitute proximate cause, the injury must be the natural and probable consequence of the negligence, and be such as an ordinarily prudent person ought to have foreseen, might probably occur as a result of the negligence.—Jenkins v. La Salle County Carbon Coal Co., Ill., 106 N. E. 186.

94.——Safe Place to Work.—Though negligence alleged by the complaint of a railroad employe for injury from the explosion of a torpedo on the track under his push-car is the placing and leaving of the torpedo on the track, the action is for failure to make and keep the place of work reasonably safe.—Southern Ry. Co. v. Howerton, Ind., 106 N. E. 369.

95. **Partition**—Judicial Sale.—Where an infant owned a two-thirds' interest in certain real property in fee, and a remainder in the other third, set apart to defendant as dower, they were not joint owners, and a judicial sale for division could not be had under Civ. Code Prac. § 490.—Van Meter v. Van Meter, Ky., 169 S. W. 592.

96.——Riparian Owners.—A suit to determine the various rights of riparian proprietors in a stream flowing past their land as between themselves is not a suit for partition of land.—Tracey Development Co. v. People, N. Y., 106 N. E. 330.

97. **Partnership**—Retiring Partner.—A retiring partner who was a member of the firm when plaintiff was engaged is liable for her wages, where plaintiff had neither notice of dissolution nor knowledge of facts charging her with notice.—Egholm v. Williams, Wash., 143 Pac. 152.

98. **Perjury**—Self-Incrimination. — While a witness before a grand jury may decline to answer questions tending to incriminate him, yet, if he answers falsely, perjury may be assigned thereon.—People v. Miller, Ill., 106 N. E. 191.

99. **Principal and Agent**—Acceptance of Benefits.—A principal cannot accept and retain the benefit of a bargain made for him by his agent and refuse to pay the promised consideration. —McCann v. Clark, Iowa, 148 N. W. 1025.

100. **Reformation of Instruments**—Laches.— Where an illiterate person conveyed his property to his wife in reliance on false statements

that the deed contained an agreement to reconvey, his failure to sue to reform the deed, held not barred by laches, though he delayed more than 13 years, where no rights of third parties intervened.—Rigell v. Gaskins, Ga., 82 S. E. 1057.

101. **Remainders** — Merger.—The reversion and the life estate of the one on whose death the remainder was contingent, uniting in one person, would merge and destroy the remainder. Hill v. Hill, Ill., 106 N. E. 262.

102. **Removal of Causes**—Foreign Corporation.—A state statute requiring a foreign corporation, as a condition of being permitted to enter or remain in the state, to stipulate that it will not exercise its constitutional right to remove suits to the federal courts or prosecute suits therein is invalid, and revocation of a corporation's license under such statute may be restrained.—Western Union Telegraph Co. v. Frear, U. S. D. C., 216 Fed. 199.

103.——Notice.—Judicial Code, § 29, providing that written notice of intent to file a petition and bond for removal shall be given to the adverse party prior to filing the same, is mandatory and an unexcused failure to give such notice is ground for remand.—Arthur v. Maryland Casualty Co., U. S. D. C., 216 Fed. 386.

104. **Sales**—Bill of Lading.—Buyer refusing to make payment on goods held to pass no title by transferring bill of lading to an innocent purchaser.—Orilla Lumber Co. v. Chicago, M. & P. S. Ry. Co., Wash., 143 Pac. 152.

105.——Co-Warrantor.—Where a bank, at different times, took assignments of drafts with bills of lading attached for two different automobiles, sold by the same buyer to the same seller, the bank was a co-warrantor in both trnsactions, and the amount received by it upon the second draft could be attached by the buyer in an action to recover for breach of warranty in the sale of the first car.—Mobile Auto Co. v. R. W. Sturges & Co., Miss., 66 So. 205.

106. **Set-Off and Counterclaim**—Breach of Contract.—Where plaintiff's breach of earlier logging contracts necessitated defendant's paying an increased price to have the contracts completed, defendant is, in an action for sums due on the contract, entitled to set off his increased expenditure as a counterclaim.—Philadelphia Veneer & Lumber Co. v. Garrison, Ky., 169 S. W. 714.

107. **Specific Performance**—Fraud. — Fraudulent representation by plaintiff's agent in negotiating for exchange of lands held to prevent specific performance, though defendant concealed from plaintiff the making of such representation by his agent, even assuming that such concealment constituted fraud.—Heitman v. Clancy, Iowa, 148 N. W. 1011.

108. **Trusts**—Equity.—Equity will not allow a trust to fail for lack of a trustee holding legal title.—Sherlock v. Thompson, Iowa, 148 N. W. 1035.

109.——Ex Maleficio.—To establish a trust ex maleficio there must be an element of positive fraud, by means of which the legal title is wrongfully acquired; something more than a mere verbal promise.—Hunter v. Field, Ark., 169 S. W. 813.

110. **Vendor and Purchaser** — Constructive Notice.—Constructive notice furnished by a recorded instrument as to the boundary of the land and every other material fact recited therein is as conclusive as actual notice.—Loeb v. Conley, Ky., 169 S. W. 575.

111.——Lien.—One who levies upon land belonging to his judgment debtor, which is shown by the deed to be incumbered by a lien for the purchase price, acquires only a lien inferior to the purchase-money lien.—Likens v. Pate, Ky., 169 S. W. 734.

112.——Reliance on Representations.—Purchasers of a lot could rely upon representations of the seller's agent that the lot selected by them was the lot designated as lot 35 on a map, and the vendor could not show that the purchasers might have ascertained that such representations were untrue.—Taber v. Piedmont Heights Bldg. Co., Cal., 143 Pac. 319.

113.——Time of Essence.—Where time is not of the essence of a contract for the sale of land, nonpayment of the purchase price at the time stipulated will not authorize a rescission or forfeiture.—Burkhalter v. Roach, Ga., 82 S. E. 1059.

114. **Waters and Water Courses**—Appropriation.—A complaint in a suit by an upper user against lower riparian owners, alleging that they were using more water than they were entitled to, and failing to allege any specific wrong committed by defendants, held demurrable.—Tracey Development Co. v. People, N. Y., 106 N. E. 330.

115.——Riparian Owner.—Riparian owners are not entitled to take the waters of a stream in accordance with the acreage of their property, and no one of them can take so much water as to injure the rights of others.—Henderson v. Goforth, S. D., 148 N. W. 1045.

116. **Wills**—Construction.—A testator's will held to contemplate that the proceeds of his life insurance should be used only to discharge his one-half of the purchase price of land which he and his stepmother had jointly bought, and hence the devisee of the stepmother is bound to pay her unpaid share of the purchase money.—Penick v. Tribble, Ky., 169 S. W. 607.

117.——Destruction of.—Destruction of will by agreement of all parties in interest, held to vest in each of testatrix's children an undivided interest as an heir at law; and written contract to that effect was unnecessary.—Dueringer v. Klocke, 149 N. Y. Supp. 332.

118.——Execution.—That a testator, in signing his name on one of the sheets of his will, omitted one letter of his first name did not affect the validity of the will, where it appeared that he intended to and did sign it.—Boone v. Boone, Ark., 169 S. W. 779.

119.——Fraud.—That the execution of a second will has been procured by fraud of the principal beneficiary, to the injury of a legatee under the first will, is ground for refusal to probate the second will.—Churchill v. Neal, Ga., 82 S. E. 1065.

120.——Income.—Where testator bequeathed the residue of his estate, including certain stock, to a trustee to pay the income to his widow, and after her death to distribute the corpus among others, dividends declared during the life of the widow by the corporations constituted income and not capital.—Washington County Hospital Ass'n v. Hagerstown Trust Co., Md., 91 Atl. 877.

121.——Lapse of Legacy.—Where the will manifests an intent, in making a gift of an aggregate sum to certain relations, to provide for them as a class, the designation of each individual by name or the use of words denoting equality, will not make the gift one of a separate interest which would lapse by death of the donee before that of the testator.—In re Ives' Estate, Mich., 148 N. W. 727.

122.——Trust.—A will need use no particular words to create a trust, but it is enough that from all the language in it, a trust is fairly implied.—In re Dewey's Estate, Utah, 143 Pac. 124.

123.——Undue Influence.—Where testator virtually disinherited his wife so far as he could, the mere fact that certain relatives, one of whom received the bulk of his property under the will, had an opportunity to exercise undue influence did not authorize the finding that such influence was exercised.—In re Burke's Will, 149 N. Y. Supp. 142.

124. **Witnesses**—Redirect Examination.—In a prosecution for incest, where the defense, in cross-examining the prosecuting witness, attempted to show that her statement that the act occurred while the parties were standing, and that conception was unreasonable, it was proper for the state to show on redirect examination that defendant and witness had previously had intercourse on numerous occasions.—Vickers v. State, Tex., 169 S. W. 609.

125.——Wife.—After termination of the marriage relation, one spouse is not incompetent to testify in a case in which the other is a party, as to independent facts, which are within the witness' knowledge and not privileged communications.—St. Louis & S. F. R. Co. v. Goode, Okla., 142 Pac. 1185.